In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,
Plaintiff in Error,
vs.
TACOMA RAILWAY & POWER COMPANY, a corporation,
Defendant in Error.

No. 2453.

PETITION FOR RE-HEARING

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The defendant in error respectfully petitions the court for a rehearing of the above entitled action, and bases its petition for rehearing upon the following grounds:

I.

It was within the discretion of the trial court to refuse to permit the plaintiff in error to recall the

witness Matthieson for cross-examination, and the exercise of that discretion is not subject to review in this court.

II.

That the refusal of the court to permit the re-cross-examination of the witness Matthieson, if it was error, was harmless error, because the facts sought to be established by the proposed re-cross-examination were fully established by other evidence.

In the opinion the ground of reversal is stated as follows:

"The action of the court in refusing to allow plaintiff in the case to show that the witness Matthieson had a direct interest in the result of the trial was duly assigned for error and constitutes such error as requires the reversal of the judgment."

The assignment of error is as follows:

"That said district court erred in refusing to permit the witness Martin Matthieson to answer the following question, viz.: 'I show you the defendant's exhibit G, being in the form of an agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that.' "

It will be noted that the question requires an expression by the witness of his opinion as to whether the paper he signed, if he signed any, was similar to the paper signed by Roberts. If any contract had been entered into by Matthieson in

writing, it would be the best evidence. The question was a double one, inquiring as to whether the defendant had entered into a contract and also inquiring as to the contents of the writing in regard to whether it was similar to another contract.

There was no offer to indicate what the answer to the question would be. There is nothing to indicate that it is more probable that the witness would have answered "No" than that his answer would have been "Yes."

This is not a case where at the time the witness was on the stand a proper question was asked him as to whether he had entered into any agreement in regard to liability to the company for his negligence, and where the court held the inquiry to be improper. This is a case where the proper time for taking up an inquiry of this kind had passed, and the examination of the witness had been closed. The evidence of the defense had been put in and the only legal right of the plaintiff remaining was the right to introduce his rebuttal testimony.

Section 861 of the Revised Stat. of the U. S.. provides that "the mode of proof in the trial of actions at common law shall be by oral testimony, and by examination of witnesses in open court, except as hereinafter provided."

Section 721 provides that, except as otherwise provided, the laws of the several states "shall be

regarded as the rules of decision in trials at common law."

The last mentioned section has been held to apply to rules of evidence prescribed by the laws of the State in which the Federal court was sitting.

Parker vs. Moore, 111 Fed. 470.

The laws of the state relating to evidence, means not only the statutes of the state, but also the decisions of its highest courts respecting rules of evidence.

Nashua Savings Bank vs. Anglo-American Land Co., 189 U. S. 228, 47 L. Ed. 782.

Section 339 B. & R. Codes & Stats. of Washington provides the manner in which a trial shall proceed after a jury is sworn. The first clause of the section relates to opening statements, then follows this provision:

"The plaintiff, or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence; the parties will then be confined to rebutting evidence, unless the court shall consider that justice requires that evidence in the original case may then be offered."

The opinion of this court virtually holds that the trial court does not have the power after the evidence of the plaintiff is in and after the evidence of the defendant is in, to confine the further testimony of the plaintiff to matters of rebuttal. In effect, it is held that an adherence to the well

established rules in regard to the order of proof constitutes such an abuse of discretion as to require a reversal of the case. It is conceded that the evidence offered was not rebuttal (Record, p. 91).

The evidence rejected in this case was not evidence that was relevant or material to any issue raised in the case. It merely related to the collateral question of the interest of the witness. We submit that the rule is the same that governs cross-examination for the purpose of testing the knowledge of a witness.

See *Wabash Screen Door Co. vs. Lewis*, 184 Fed. 260, where the question ruled out was put for the purpose of testing the knowledge of the witness, and it was held that the error, if any, was not prejudicial.

Any matter affecting the credibility of a witness has always been a matter peculiarly for the trial court. The courts, where questions of credibility have been passed on by the jury or by the judge without a jury, almost uniformly have refused to review any question in regard to credibility.

It has been universally regarded that the scope of cross-examination, that the matter of the recalling of witnesses for further examination, and that the reopening of a case after defendant's evidence is in, for purposes other than rebuttal testi-

mony, are matters peculiarly within the discretion of the trial court.

In *Johnson vs. Jones*, 1 Black 209, L. Ed. p. 122, there was in review the ruling of the court in excluding evidence tending to affect the credibility of one of the defendant's witnesses. The court says:

"We estimate at its highest value the power of cross-examination. The extent to which it may be carried, touching the merits of the case, was defined by this court in *Phil. & Trenton R. R. Co. vs. Simpson*, 14 Pet. 448. The rule there laid down, this court has since adhered to. A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a circuit court cannot be made the subject of review by this court. We have looked through the long and searching cross-examination to which this witness was subjected. There would have been no error if the objection had been overruled. There was none in sustaining it."

In *Davis vs. Coblens*, 174 U. S. 719, 43 L. Ed. 1147, it is said:

"Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10, the lot in controversy. Thereupon, defendant's counsel cross-examined him at great length, against the objection of plaintiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiff's counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it

extended to matters not connected with the examination-in-chief. In *Rea vs. Missouri*, 17 Wall 532 (21:707), it was said: 'When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion and the exercise of that discretion is not reviewable on a writ of error.' "

In *Frost vs. U. S.*, 163 U. S. 452, L. Ed. 225, it is said:

"The fourth assignment complains of the refusal of the trial court to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination. This was plainly a matter within the discretion of the court below."

In *Seymour vs. McDonald Lbr. Co.*, (Cir. Crt. of Appls. 6th Cir.) 58 Fed. 957-960, it is said:

"The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the case. *Houghton vs. Jones*, 1 Wall 706; *Railroad Co. vs. Stimpson*, 14 Pet. 461; *Willis vs. Russell*, 100 U. S. 621, 625. In the case last cited it was further held that a judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination-in-chief was applied and enforced. The course and extent of cross-examination, when directed to matters not inquired about in the principal examination, is very largely subject to the control of the court, in the exercise of a sound discre-

tion which is not reviewable on a writ of error. *Rea vs. Missouri*, 17 Wall 542; *Johnston vs. Jones*, 1 Black 216."

In *Hart vs. U. S.*, 84 Fed. 799, the court held as stated in the syllabus, that "the refusal of the trial judge, after the evidence on both sides had been closed, to permit defendant to examine another witness is a matter of discretion and not reviewable."

In *Union Pacific Ry. et al. vs. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 328, the following language is used:

"After the testimony had been closed, and at the final argument, the defendants moved the court to permit the introduction of the evidence on which alone this contention is based. The complainant objected on the grounds that the testimony had been closed, no good reason was shown for its introduction at that time, it was incompetent, irrelevant and immaterial. The court overruled the motion, sustained complainant's objections, and defendants excepted. It was discretionary with the court below to grant or refuse the motion. To refuse it was certainly no abuse of this discretion, and we do not feel authorized to consider this rejected evidence, or the argument based upon it. Without the rejected evidence, the record proved this contract to be within the powers of the Rock Island Ry. Company."

We direct the court's attention to the case of *Resurrection Gold Mining Company vs. Fortune Gold Mining Company*, 129 Fed. 668, and particularly to the concurring opinion written by Judge Hook, where the right of a circuit court of appeals to review matters peculiarly within the jurisdic-

tion of the trial judge is considered at considerable length and many cases from the U. S. Supreme Court and federal cases are quoted from and referred to. The court holds in the above case that the discretion of the trial court exercised in admitting or rejecting is not subject to review.

Wignore, in his work on Evidence, Vol. 3, says in section 1899:

"Recall for Re-cross-examination. A recall for re-cross-examination will ordinarily be unnecessary, except in rare cases where the direct examination of an intervening witness has brought out new facts upon which the prior witness may throw light, and for this purpose the matter can always be left in the hands of the trial court. The general principle, therefore, of the trial court's discretion as controlling the grant of a recall for this purpose (§1898) is conceded to apply here also. The only exception possibly is that of a recall to put the warning question essential to lay a foundation for impeaching by proof of a prior self-contradictory assertion; here it is sometimes held that the recall is a matter of right."

In Section 1898, Wigmore says, in reference to recall for re-direct examination, "accordingly, while it does not seem to be maintained that there are cases in which a recall may be demanded as of right, it is conceded that the allowance of a recall, upon the general principle, rests entirely with the Court's discretion."

We wish to call the court's attention to the fact that exhibit G was used only for the purpose of proving the signature of the witness who had

denied making a statement in writing to the defendant company, and was used for no other purpose. The plaintiff in the case, for some reason or other did not put on this witness to prove his main case, but used him solely for rebuttal. The evidence he introduced was not in rebuttal, but was direct evidence in support of his case in chief and he was permitted to testify only in the discretion of the trial judge. At the very close of the case they sought to recall one of defendant's witnesses to show whether or not he had signed a form similar to exhibit G. It is admitted that it was not in rebuttal, and it must be conceded by the court that it was not in cross-examination of anything brought out by the witness Matthieson in his direct examination.

If there is anything that can be left to the discretion of a trial court, we submit that in this particular instance the discretion of the trial court was rightfully exercised and is not subject to review by this court. This principle, we maintain, is so fully supported by the authorities that we do not consider it necessary to cite the great multitude of cases on this point which have been decided in the courts of last resort of the various states.

We believe that it has been universally held that error in excluding evidence as to a certain fact is harmless where the fact was fully established by other evidence.

See Dec. Dig. Appeal and Error, Sec. 1057, where over 100 cases are cited.

The fact sought to be shown by the testimony was that Matthieson had a direct interest in the result of the trial, because he was bound to reimburse the defendant company for any loss occasioned to it by his negligence. There was no dispute that Matthieson was in the employ of the company at the time of the accident as a conductor. Liability of Matthieson to respond to the company for loss occasioned by his negligence necessarily existed by reason of his employment. This interest existed whether he had or had not signed an agreement similar to Exhibit "G."

If the defendant in error is right in its contention as to the law in regard to this interest existing independent of Exhibit "G," the case comes clearly within the line of cases holding that error is harmless where it consists in rejecting evidence showing a fact, where such fact is already shown.

In addition to the cases cited on page 14 of the brief of defendant in error, we request the attention of the court to the following addditional cases:

In *Georgia & S. F. Ry. Co. v. Jossey* (Ga.), 31 S. E. 179, in holding that the railroad company was entitled to recover from a baggage man in its employ the loss sustained by the company in consequence of a trunk being stolen, the court says:

"The principal, the railroad company, having been required on account of the negligent conduct of the baggage master, and his agent, to indemnify the passenger against loss on account of the theft

of the baggage, was entitled to reimbursement at the hands of the baggage master for the amount which it had paid out. Judge Story, in his work on Agency, in dealing with this subject, says: 'Wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence, or by omission in the proper functions of his agency, or in any other manner, and any loss or damage falls on his principal, he is responsible therefor, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done or is omitted to be done. It will be sufficient if it is fairly attributable to it as a natural result of a just consequence.' "

In *Doremus v. Root*, 23 Wash. 715, the court says:

"For injuries caused by the negligent act of an employe not directed or ratified by the employer, the employe is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondeat superior* — the rule of law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employe, and when the employer is compelled to answer in damages therefor he can recover over against the employe. *Oceanic Steamer Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461 (31 N. E. 987, 30 Am. St. Rep. 685); note to *Village of Carterville v. Cook*,

16 Am. St. Rep. 248; Shearman & Redfield, Negligence (5th Ed., §242); 2 Van Fleet, Former Adjudication, p. 1162."

See, also,

Phoenix Bridge Co. v. Creebe, 92 N. Y. S. 855, affirmed in 78 N. E. 1110.

Costa v. Yoachim (La.), 28 So. 992.

Glove v. Richardson, 64 Wash. 403.

Central of Georgia Ry. Co. v. Macon (Ga.), 71 S. E. 1078.

Late v. Fenn, 120 N. Y. S. 237-244.

Kampmann v. Rothwell (Texas), 109 S. W. 1089.

Scott v. Custer (N. Y.), 88 N. E. 794.

We have found no cases which support the contention that the master cannot, without an express agreement, recover from his servant for loss occasioned by the negligence of the servant.

The new equity rule No. 46 provides that whenever evidence is offered and excluded and exception is made to the ruling, the court shall report so much thereof or make such a statement respecting it as will clearly show the character of the evidence, and the form in which it was offered.

The rule then provides "if the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree, unless it be *clearly of the opinion that material prejudice will result* from an affirmance, in which event

it shall direct such further steps as justice may require."

We submit that the rule in regard to presumption of prejudice ought not to be greater in cases where an appeal is made to the discretion of the court than in cases where the parties to an equity proceeding at the proper time, in the proper order, offer proof which is rejected by the court. Would the court be willing to say that it is clearly of the opinion that the verdict would have been different if the question asked the witness had received an affirmative answer?

For the reasons stated, the defendant in error requests a rehearing. The defendant in error contends that the rule laid down in this case of interfering on appeal in matters of recalling of witnesses, scope of cross-examination, and opening up questions other than questions of rebuttal after defendant has put in its evidence, is not in accordance with the existing rules in other circuits. Because of the gravity and importance of the matter of a court of appeals undertaking to regulate matters which defendant in error contends are matters exclusively within the jurisdiction of the trial court, and in the interest of uniformity of decision, the defendant in error, in the event this petition for rehearing is overruled, requests the court to stay the remittitur in this case for such reasonable length of time as to the court may seem proper, in order to allow the defendant in error an opportu-

nity to apply for a writ of certiorari to the Supreme Court of the United States, and the defendant in error suggests that the period of such stay shall be at least 90 days.

Respectfully submitted,

JOHN A. SHACKLEFORD,

F. D. OAKLEY.

I. F. D. Oakley, counsel for the defendant in error in the above cause, do hereby certify that the foregoing petition for rehearing in my opinion is well founded in law, and that it is not interposed for delay.

F. D. Oakley

Attorney for Defendant in Error.